Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MRO COMMUNICATIONS, INC.,
a Nevada Corporation,
Petitioner,

v.

AMERICAN TELEPHONE &
TELEGRAPH COMPANY, now AT&T Corp.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether under Fed.R.Civ.P. Rule 68 and Delta Air Lines v. August, 450 U.S. 346 (1981), a defendant who makes a formal settlement offer only under Rule 68, which is rejected, and then obtains judgment against the plaintiff offeree on state law claims, may recover attorney's fees against the plaintiff?

PARTIES TO THE PROCEEDING

Petitioner

The parent company of Petitioner MRO Communications, Inc. ("MRO") is Bellatrix International, Inc. a corporation which has shares issued to the public.

Respondent

The Respondent is AT&T Corporation.

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Petitioner MRO Communications, Inc. ("MRO") respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 197 F.3d 1276 (9th Cir. 1999). A copy of the opinion is included in Appendix ("App.") A at 1a. A copy of the Order of the United States District Court for the District of Nevada is included in App. B at 17a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its opinion on December 13, 1999. Petitioner filed a Petition for Rehearing and Rehearing En Banc, which was denied on January 27, 2000 (App. C at 19a). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Section 2072(a)(b)

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Rule 68, Federal Rules of Civil Procedure

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party as judged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less

than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

STATEMENT OF THE CASE

A. Factual Background.

On May 31, 1995, MRO filed its First Amended and Supplemental Complaint ("FASC") averring federal claims for violation of the antitrust laws, 15 U.S.C. Sections 1 and 2 and for violation of the Federal Communications Act, 47 U.S.C. Sections 201 and 202. MRO also averred numerous state law claims including breach of contract, tortious breach of implied covenant of good faith and fair dealing, interference with prospective economic advantage and an accounting. On July 30, 1998, the District Court entered its Order and Amended Judgment in favor of AT&T dismissing all MRO's claims, state and federal.

As stated by the Court of Appeals (App. A at 3a):

"On June 3, 1996, AT&T filed the following offer of judgment:

> 'Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant AT&T Corp. ("AT&T") hereby offers to allow judgment to be taken against it in this action, in the amount of one hundred thousand dollars ($100,000), together with the costs accrued to date in accordance with Fed.R.Civ.P. 68. This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that the defendant is liable in this

action or that the plaintiff has suffered any damage.'

The offer was sent to Richard Archer, counsel for MRO, on the same date. MRO did not accept the offer."

Thus, AT&T's offer of judgment to MRO was expressly made under Rule 68, and did not refer to any state offer of judgment statute or rule.

B. The Proceedings Below.

Since a judgment was not obtained by the offeree MRO, AT&T (in an apparent attempt to avoid the application of Rule 68 as interpreted by Delta Airlines v. August, 450 U.S. 346 (1981))[1] moved the District Court to assess attorney's fees in AT&T's favor based only on the time spent by its attorneys defending against MRO's state law claims after MRO's rejection of AT&T's Rule 68 offer of judgment; even though AT&T's Rule 68 offer did not refer to any state law offer of judgment statute or rule.[2] The district court awarded AT&T a judgment for such attorney's fees without discussing Delta Air Lines v. August, 450 U.S. 346 (1981) (App. B at 17a-18a). The Court of Appeals affirmed apparently on the basis that the district court had discretion to

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[1] Delta Airlines, supra, held that Rule 68 does not permit an award of attorney's fees when the defendant offeor obtains a judgment.

[2] Although AT&T was in federal court, AT&T could have made an offer of judgment under Nevada state law in this case; but they did not, Tanker Mgmt., Inc. v. Brunson, 918 F.2d 1524, 1526 (11th Cir. 1990).

award fees for time spent defending pendant state claims (App. A at 1a).

MRO submits that as a rule of procedure, Rule 68, Fed.R.Civ.P. governs even as to pendant state claims, Santana v. Holiday Inns, Inc., 686 F.2d 736, 740 (9th Cir. 1982) (diversity jurisdiction). If this is correct, AT&T as a successful defendant is not entitled to attorney's fees under Delta Air Lines, supra.

The Opinion of the Court of Appeals can only be construed as holding that Federal Rule 68 does not apply to state law claims; the Opinion states (App. A at 7a):

> "In this matter, however, no underlying substantive *federal* statute is applicable in determining whether AT&T is entitled to attorneys' fees incurred in defending against MRO's state law claims. Furthermore, Rule 68 is inapplicable in a case in which the defendant obtains judgment. Delta Air Lines, Inc. v. August, 450 U.S. 346, 352 (1981). Where a defendant prevails after making an offer of judgment, 'the trial judge retains his Rule 54(d) discretion.' Id. at 354. Because AT&T obtained judgment, Federal Rule 68 is inapplicable in determining whether the district court properly awarded attorneys' fees to AT&T."

and (App. A at 8a):

> "In an action where a district court is exercising its subject matter jurisdiction over a state law claim, so long as 'state law does

> not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.' Alyeska Pipeline Serv., 421 U.S. at 259 n.31 (quoting 6 Moore's Federal Practice Section 54.77[2] (2d ed. 1974)).[3]"

and (App. A at 13a):

> "It would be unjust and a violation of the national policy described in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), to reach a different result here simply because the forum is federal."

However, the Ninth Circuit's decision is explicitly contrary to Erie R. Co. v. Tompkins, supra, because even under Nevada state law, AT&T's offer of judgment to MRO fails since AT&T's offer of judgment did not specifically give notice to MRO of the precise Nevada statute under which such offer of judgment was being made.[4]

---

[3] The Opinion's reliance on Alyeska Pipeline Serv. v. Wilderness Society, 421 U.S. 249 (1975) is misplaced because that case (1) preceded Delta Airlines, Inc. v. August, 450 U.S. 346 (1981), (2) did not involve Rule 68, and (3) did not involve an offer of judgment.

[4] More specifically, under Nevada law the District Court had no discretion to award attorney's fees. The Ninth Circuit's Opinion (App. A at 12a) recognizes that under Nevada law (i.e., Trustees of Carpenters Health and Welfare Trust v. Better Building Co., 710 P.2d 1379, 1383 (Nev. 1985) and

The Opinion acknowledges that AT&T's offer of judgment was made "[p]ursuant to Rule 68 of the Federal Rules of Civil Procedure." (App. A at 3a, App. D at 24a-26a).

However, rejecting Hanna v. Plumer, 380 U.S. 460, 468 (1965), the Ninth Circuit refused to apply Rule 68 to state law claims. This was error.

> "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal

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Ramadanis v. Stupak, 752 P.2d 767, 768 (1988)) unless the offer of judgment specifies the precise Nevada statute or rule involved, the offeror has no right to recover costs and/or attorney's fees. However, AT&T's Rule 68 offer in this case did not specify any Nevada rule or statute. The Opinion then states (App. A at 12a):

> "In its opinions in *Trustees* and *Ramadanis*, the Nevada Supreme Court did not purport to prescribe the procedure that should be followed in a *federal* court in making an offer for judgment. The only procedure for notifying a plaintiff of an offer of judgment in federal court is set forth in Federal Rule 68. AT&T followed that procedure in making its offer."

However, there is nothing in Federal Rule 68 which prevented AT&T when it made its federal offer of judgment from (1) referring to the specific Nevada statute, or (2) making an offer under Nevada statutes as in the Tanker case.

procedure or Congress' attempt to exercise that power in the Enabling Act." Hanna v. Plumer, 380 U.S. 460, 473-474 (1985) (Applying Rule 4(d)(1)).

REASONS FOR GRANTING THE WRIT

I. WHETHER DELTA AIRLINES V. AUGUST, 450 U.S. 346 (1981) APPLIES TO STATE CLAIMS IN FEDERAL COURT CONCERNS EVERY STATE CLAIM BROUGHT IN FEDERAL COURT.

Settlement offers and attorney's fees awards are clearly important in every action in federal court. Litigants should be able to tell whether offers of settlement made pursuant to Rule 68, Fed.R.Civ.P. apply to state law claims. Many actions in federal court involve both state law and federal claims, as does this one. Under the Court of Appeals' Opinion in this action, the same settlement offer will be treated differently for federal claims and for state law claims in the same case. Rather than serving "to encourage settlements and avoid protracting litigation" (Advisory Committee Notes to 1946 Amendment), the Opinion's application will only cause confusion. Most often settlement offers are made for the whole action, not so much for federal claims and so much for the state law claims. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) does not prevent this Court from providing a uniform offer of settlement rule under Rule 68 for both state law and federal claims in federal court. Hanna v. Plumer, 380 U.S. 460 (1965).

Even if Delta Airlines, supra, is not controlling, then the Ninth Circuit's Opinion is inconsistent with Erie v. Tompkins, 304 U.S. 64 (1938) because (as stated previously) under Nevada law AT&T can not recover attorney's fees since its offer of judgment failed to specify the precise Nevada statutes under which it was seeking attorney's fees.

II. IF THE JUDGMENT ON THE MERITS DISMISSING THE ANTITRUST CLAIMS IS REVERSED, THE ATTORNEY'S FEE AWARD MUST BE REVERSED.

MRO has also petitioned this Court, Petition No. 99-1480, to reverse the judgment dismissing its antitrust claim in this same action. If that occurs, this attorney's fees judgment must also be reversed.

CONCLUSION

The Petition for Writ of Certiorari should be granted in order to adopt a uniform offer of settlement rule for all claims, state law or federal, in civil cases in the United States District Courts.

Dated: March 13, 2000.

Respectfully submitted,

/s/_____

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed December 13, 1999]

No. 98-16715
CV-95-00503-PMP

MRO COMMUNICATIONS INC., *Plaintiff-Appellant,*	)
v.	)
AMERICAN TELEPHONE & TELEGRAPH COMPANY, now AT&T Corp., *Defendant-Appellee.*	)

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Before: Herbert Y. C. Choy, Mary M. Schroeder, and
Arthur L. Alarcon, Circuit Judges.

OPINION

ALARCÓN, Circuit Judge:

MRO Communications, Inc, ("MRO") appeals from the award of $2,009,844.89 to AT&T as the prevailing party for the attorneys' fees it incurred in defending this action against MRO's state law claims following the rejection of AT&T's offer of judgment. MRO contends that the district court erred in awarding attorneys' fees based on an offer of judgment filed pursuant to Rule 68 of the Federal Rules of Civil Procedure because the judgment was in favor of AT&T. We affirm because we conclude that the district court did not abuse its discretion in awarding attorneys' fees.

I

AT&T offers 900 telephone number services. AT&T's customers are information providers ("IPs") who operate pay-per-call information services. The two kinds of services offered to IPs by AT&T are transport services and billing services. Transport services provide the telephone lines over which the information or voice data is actually transmitted. Billing services include sending invoices to callers, collecting the amounts owed, and forwarding those amounts on to the IP.

MRO was an IP. In 1989 MRO became an AT&T customer, MRO subscribed to AT&T's transport and billing services. A tariff governed the provision of transport services. Section 203(a) of the Federal Communications Act ("FCA") requires every common carrier to file schedules, or

tariffs with the FCC showing the rates, classifications, practices, and regulations affecting their services. 47 U.S.C. § 203(a). ATT&T provided billing services pursuant to private contract between MRO and AT&T.

A number of disputes clouded the business relationship between MRO and AT&T. As a result, MRO filed a complaint on April 26, 1993, alleging claims arising under federal law and state law claims within the district court's supplemental jurisdiction. On February 8, 1995, MRO filed an amended complaint. The amended complaint contained a total of twenty-eight claims, including state law claims for breach of contract and tort, as well as causes of action arising under federal law.

On June 3, 1996, AT&T filed the following offer of judgment:

> Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant AT&T Corp. ("AT&T") hereby offers to allow judgment to be taken against it in this action, in the amount of one hundred thousand dollars ($100,000), together with costs accrued to date in accordance with Fed. R. Civ. P. 68. This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that the defendant is liable in this action or that the plaintiff has suffered damage.

The offer was sent to Richard Archer, counsel for MRO, on the same date. MRO did not accept the offer.

On May 18, 1998, after an eight-day jury trial, the district court granted AT&T's motion for judgment as a matter of law. On June 1, 1998, AT&T filed a motion pursuant to Federal Rule of Civil Procedure 54(d)(2) and local Rule 54-16 to recover "attorneys' fees incurred in defending itself against MRO's state law claims after June 3, 1996, the date on which AT&T made an offer of judgment that MRO rejected." On July 30, 1998, the district court entered a final judgment for AT&T on all of MRO's claims.

On August 3, 1998, the district court ordered MRO to pay AT&T $2,009,844.89 in attorneys' fees and costs. The order reads in pertinent part:

> By its Motion, AT&T seeks recovery of $2,009,844.89 it incurred as legal fees and costs in defense of MRO's state law claims on which AT&T prevailed in full between the date its offer of Judgment to MRO was rejected in July 1996, to and including May 18, 1998, when Judgment was entered in favor of AT&T and against MRO.
>
> The attorney's fees sought by Defendant AT&T do not include work relating to MRO's federal statutory claims on which AT&T also prevailed. Although the fees requested are substantial, so was the litigation which spawned them. Having considered the Affidavits and Exhibits submitted in support of an in opposition of AT&T's Motion, the Court finds the attorney's fees are reasonable, and

> that under the applicable law, Defendant AT&T is entitled to recover them.

AT&T did not file separate offers of judgment regarding MRO's state law claims pursuant to Nevada and New Jersey law. In its motion for costs and attorneys' fees, AT&T did not request an award for its defense of the federal law claims.

II

MRO contends that the district court abused its discretion in awarding attorneys' fees because AT&T did not file separate offers of judgment under Nevada and New Jersey law. Before this court, MRO maintains that "an award of attorneys' fees to AT&T would run counter to [Federal] Rule 68 pursuant to *Delta Airlines v. August*, [450 U.S. 346 (1981)]-because judgment was not obtained by the offeree, MRO Communications, Inc." We review the district court's award of attorneys' fees made pursuant to state law for an abuse of discretion. *See 389 Orange St. Partners v. Arnold*, 179 F.3d 656, 661 (9th Cir. 1999).

Federal Rule 68 sets forth the procedure that must be followed in a federal district court to make an offer of judgment. *See* Fed. R. Civ. P. 1 ("These rules govern the procedure in the United States district courts in all suits of a civil nature. . . .") MRO has not cited any decision that requires a defendant to make an offer of judgment under state law as well as federal law in order to recover attorneys' fees, where the plaintiff has filed in a district court state law claims and causes of action arising under federal law.

AT&T's offer of judgment did not refer to attorneys' fees. Instead, AT&T stated that its offer was made "for the purposes set forth in Rule 68, and is not to be construed either as an admission that the defendant is liable in this action or that the plaintiff has suffered any damage." Federal Rule 68 provides notice that if the judgment awarded to the plaintiff is less than the offer made by the defendant, the plaintiff "must pay the costs incurred after the making of the offer." The terms "costs" is not defined in Federal Rule 68.

The Supreme Court interpreted the word "costs" as used in Federal Rule 68 in *Marek v. Chesny*, 473 U.S. 1 (1985). The Court first explained that "under the 'American Rule,' each party had been required to bear its own attorney's fees." *Id.* at 8. The Court noted, however, that there are exceptions to the "American Rule." "[M]ost of the exceptions were found in federal statutes that directed courts to award attorney's fees as part of costs in particular cases." *Id.* (*citing Alyeska Pipeline Serv. Co. v. Wilderness Society,* 421 U.S. 240, 260-211 (1975)). The Court concluded in *Marek* that "the most reasonable inference is that the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority." *Id.* at 9. The Court held in *Marek* that attorneys' fees are included in the word "costs" in Federal Rule 68 in actions filed pursuant to 42 U.S.C. § 1983 because § 1988 expressly provides that a prevailing party may be awarded attorneys' fees as part of the costs. *Id.* In *United States v. Trident Seafoods Corp.*, 92 F.3d 855 (9th Cir. 1996), we held that "[t]he term 'costs' in Rule 68 is intended to refer to all costs properly awardable under the relevant substantive statute." *Id.* at 860 (citing *Marek v. Chesny*, 473 U.S. 1, 9 (1985).)

In this matter, however, no underlying substantive *federal* statute is applicable in determining whether AT&T is entitled to attorneys' fees incurred in defending against MRO's state law claims. Furthermore, Federal Rule 68 is inapplicable in a case in which the defendant obtains judgment. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981). Where a defendant prevails after making an offer of judgment, "the trial judge retains his Rule 54(d) discretion." *Id.* at 354. Because AT&T obtained judgment, Federal Rule 68 is inapplicable in determining whether the district court properly awarded attorneys' fees to AT&T.

AT&T's motion for costs and attorneys' fees was filed pursuant to Rule 54(d)(2)[1] and Local Rule 54-16.[2] Rule 54(d)(2) creates a procedure but not a right to recover attorneys' fees. *See* Advisory Committee Notes to Fed. R.

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[1] Rule 54(d)(2) provides in relevant part:

> Claims for attorneys' fees and related nontaxable expenses shall be made by motion. . . . Unless otherwise provided by statute or order of the court, *the motion* must be filed and served no later than 14 days after the entry of judgment; *must specify* the judgment, and *the statute, rule or other grounds entitling the moving party to the award*; and must state the amount or provide a fair estimate of the amount sought.

Fed. R. Civ. P. 54(d)(2) (emphasis added).

[2] Local Rule 54-16 sets forth the procedures and pleading requirements for motions for attorney's fees. MRO does not contend that AT&T's motion failed to comply with Local 54-16.

In this matter, however, no underlying substantive *federal* statute is applicable in determining whether AT&T is entitled to attorneys' fees incurred in defending against MRO's state law claims. Furthermore, Federal Rule 68 is inapplicable in a case in which the defendant obtains judgment. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981). Where a defendant prevails after making an offer of judgment, "the trial judge retains his Rule 54(d) discretion." *Id.* at 354. Because AT&T obtained judgment, Federal Rule 68 is inapplicable in determining whether the district court properly awarded attorneys' fees to AT&T.

AT&T's motion for costs and attorneys' fees was filed pursuant to Rule 54(d)(2)[1] and Local Rule 54-16.[2] Rule 54(d)(2) creates a procedure but not a right to recover attorneys' fees. *See* Advisory Committee Notes to Fed. R.

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[1] Rule 54(d)(2) provides in relevant part:

> Claims for attorneys' fees and related nontaxable expenses shall be made by motion. . . . Unless otherwise provided by statue or order of the court, *the motion* must be filed and served no later than 14 days after the entry of judgment; *must specify* the judgment, and *the statute, rule or other grounds entitling the moving party to the award*; and must state the amount or provide a fair estimate of the amount sought.

Fed. R. Civ. P. 54(d)(2) (emphasis added).

[2] Local Rule 54-16 sets forth the procedures and pleading requirements for motions for attorney's fees. MRO does not contend that AT&T's motion failed to comply with Local 54-16.

Civ. P. 54(d)(2) (noting that Rule 54(d)(2) "establishes a procedure for presenting claims for attorneys' fees"). In *Abrams v. Lightolier Inc.*, 50 F.3d 1204, (9th Cir. 1995) the Third Circuit interpreted Rule 54(d)(2) as follows:

> Rule 54(d)(2) recognizes the possibility of awards of 'attorney's fees and related non-taxable expenses' and establishes a procedure for asserting a right to such an award. This rule does not provide a rule of decision, however. Rather, it and the accompanying advisory committee comment recognize that there must be another source of authority for such an award.

Id. at 1224. The requirement under Rule 54(d)(2) of an independent source of authority for an award of attorneys' fees gives effect to the "American Rule" that each party must bear its own attorneys' fees in the absence of a rule, statute or contract authorizing such an award. *See, Sheet Metal Workers' Int'l Ass'n Local Union No. 359 v. Madison Indus., Inc.* 84 F.3d 1186, 1192 (9th Cir. 1996); *see also Ace Truck and Equip. Rentals, Inc. v. Kahn*, 746 P.2d 132, 138 n.4 (Nev. 1987.

In an action where a district court is exercising its subject matter jurisdiction over a state law claim, so long as "state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." *Alyeska Pipeline Serv.*, 421 U.S. at 259 n.31 (quoting 6 *Moore's Federal Practice* § 54.77[2] (2d ed. 1974)).

Under Nevada and New Jersey law, a prevailing defendant is entitled to recover attorneys' fees if an offer of judgment is rejected. In its briefs before this court, MRO did not discuss Rule 54(d)(2) or the district court's discretionary authority to award attorneys' fees under applicable state law. Nevada law provides that a defendant shall be awarded reasonable attorneys' fees incurred from the time of an offer of judgment if the plaintiff rejects it and fails to receive a more favorable result. *See* Nev. Rev. Stat. § 17.115;[3] *see also* Nev. R. Civ. P. 68.[4]

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[3] Section 17.115 provides in pertinent part:

> At any time more than 10 days before trial, either *informally* or at any pretrial conference presided over by a judge of the court in which the action is pending, any party may serve an offer in writing to allow judgment to be taken in accordance with the terms and conditions stated at that time. . . . If the party to whom the offer of judgment is made fails to obtain a more favorable judgment. . . . the court shall order him to pay to the party who made the offer that party's taxable costs incurred from the date of filing the complaint . . . and may order . . . reasonable attorneys' fees incurred by the party making the offer from the time of the offer.

Nev. Rev. Stat. § 17.115 (emphasis added).

[4] Nevada Rule 68 provides in pertinent part:

> At any time more than 10 days before the trial begins, any party may serve upon the adverse

The Nevada Supreme Court has ruled that Nevada Rule of Civil Procedure 68 encompasses a judgment against the offeree. *Beattie v. Thomas*, 668 P.2d 268 (1983). In rejecting the appellant's contrary contention, the Nevada Supreme Court stated:

> We decline to follow the *Delta Air Lines* reasoning, not only because of the differences between NRCP 68 and FRCP 68, but because such reasoning leads to an anomalous result. Under the rule proposed by appellant and followed by the majority in *Delta Air Lines*, an offeree would be penalized for recovering a judgment less favorable than the offer, but would suffer no penalty if he did not recover any judgment whatsoever.

Id. at 274. The Nevada Supreme Court also pointed out that Federal Rule 68 applies only to "costs," while "NRCP 68 expressly includes attorneys' fees." *Id.* at 274 n.5. The Court also noted that, unlike the discretionary authority granted to federal courts pursuant to Rule 54(d)(2), attorneys' fees are mandatory under Nevada Revised Statute § 18.020.

> party an offer to allow judgment to be entered for the money or property or to the effect specified in the offer, which costs then accrued . . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree shall not recover costs, nor attorneys' fees, but shall pay the costs and attorneys' fees, if any be allowed, of the party making the offer from the time of the offer.

III

In limiting its award to the attorneys' fees incurred by AT&T in defending against MRO's state law claims after the offer of judgment was rejected, the district court did not indicate whether it had applied Nevada law or New Jersey law. In an action involving state law claims, we apply the law of the forum state to determine whether a party is entitled to attorneys' fees, unless it conflicts with a valid federal statute or procedural rule. *See Bevard v. Farmers Ins. Exchange*, 127 F.3d 1147, 1148 (9th Cir. 1997) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 259 n.31 (1975)). Accordingly, we must look to Nevada state law to determine whether the district court correctly ordered attorneys' fees incurred in the defense of MRO's tort claims.

The agreement for billing services between AT&T and MRO included a New Jersey choice-of-law provision. "In a federal question action where the federal court is exercising supplemental jurisdiction over state claims, the federal court applies the choice-of-law rules of the forum state. . . ." *Paracor Fin., Inc. v. General Elec. Capital Corp.*, 96 F.3d 1151, 1164 (9th Cir. 1996). Under Nevada law, a choice-of-law provision in an agreement will be applied to "the substantive issues in a case." *Tipton v. Heeren*, 859 P.2d 465, 466 n.3 (Nev. 1993). Whether a rejected offer of judgment entitles the offeror to recover attorneys' fees, in a dispute over an agreement containing a choice-of-law provision, is a "procedural query" which must be resolved under Nevada law. *Id.* Thus, we must look solely to Nevada law to determine whether AT&T is entitled to attorneys' fees incurred in defending against MRO's tort and contract claims after the offer of judgment was rejected.

IV

The Nevada Supreme Court has held that an offer of judgment filed in that state's trial courts must specify the statute of rule that provides for the cost or fee sought by the offeree. In *Trustees of Carpenters Health and Welfare Trust v. Better Building Co.*, 710 P.2d 1379 (Nev. 1985), the defendant made an offer of judgment pursuant to Nevada Rule of Civil Procedure 68. After judgment, the defendant sought to recover an expert witness fee pursuant to Nevada Revised Statute § 17.115. *Id.* at 1382-83. The Nevada Supreme Court held that the defendant could not recover expert witness fees because the "offer of judgment in this case was tendered expressly pursuant to Rule 68." *Id.* at 1383.

In *Ramadanis v. Stupak*, 752 P.2d 767 (1988), the Nevada Supreme Court held that the defendant's unapportioned joint offer of judgment to both plaintiffs was invalid. *Id.* at 768. In dictum, the Nevada Supreme Court observed that because the offer of judgment was made pursuant to Nevada Rule of Civil Procedure 68, which does not provide for the denial of prejudgment interest, the offeror was not entitled to an offer denying prejudgment interest because he had failed to make his offer pursuant to Nevada Revised Statute 17.115(4)(a). *Id.*

In its opinions in *Trustees* and *Ramadanis*, the Nevada Supreme Court did not purport to prescribe the procedure that should be followed in a *federal* court in making an offer of judgment. The only procedure for notifying a plaintiff of an offer of judgment in federal court is set forth in Federal Rule 68. AT&T followed that procedure in making its offer. Had MRO filed its state law claims in state court, Nevada's offer

of judgment rules and statutes would provide the applicable procedure. MRO chose to file its state claims in federal court. Nevada law permits a prevailing defendant to recover attorneys' fees incurred after an offer of judgment is rejected by the plaintiff. It would be unjust and a violation of the national policy described in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), to reach a different result here simply because the forum is federal.

In *Alyeska Pipeline Service Co. v. Wilderness Society*, the Supreme Court addressed a similar situation that can arise because of our dual court systems in these words:

> Prior to the decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), this Court held that a state statute requiring an award of attorneys' fees should be applied in a case removed from the state courts to the federal courts: "[I]t is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts." *People of Sioux County v. National Surety Co.*, 276 U.S. 238, 243 (1928). The limitations of the awards of attorneys' fees by federal courts deriving from the 1853 Act were found not to bar the award. *Id.* at 243-244. We see nothing after *Erie* requiring a departure from this result. *See*

> *Hanna v. Plumer*, 380 U.S. 460, 407-468 (1965).

421 U.S. at 259 n.31. We are persuaded that the same principle should apply to a state statute that awards attorneys' fees to a defendant whose offer of judgment has been rejected in a case where the plaintiff has filed supplemental state law claims in federal court. We hold that *Delta Air Lines'* interpretation of Federal Rule 68 does not apply to an award of attorneys' fees made under Nevada law.

V.

In *Beattie v. Thomas*, 668 P.2d 268 (Nev. 1983), the Nevada Supreme Court discussed the circumstances in which an award of fees pursuant to Nevada Rule of Civil Procedure 68 are appropriate. The Court stated:

> In exercising its discretion regarding the allowance of fees and costs under NRCP 68, the court must carefully evaluate the following factors:
>
> > (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees

> sought by the offeror are reasonable and justified in amount.
>
> After weighing the foregoing factors the district judge may, where warranted, award up to the full amount of fees requested. On the other hand where the court has failed to consider these factors, and has made no findings based on evidence that the attorney's fees sought are reasonable and justified, it is an abuse of discretion for the court to award the full amount of fees requested.

668 P.2d at 274.

Here, the district court did not make specific findings on any of the factors listed above in its order awarding fees to AT&T. Instead, the district court stated that "[h]aving considered the Affidavits and Exhibits submitted in support of and in opposition of AT&T's motion [for attorney's fees], the Court finds the attorney's fees are reasonable, and that under the applicable law, Defendant AT&T is entitled to recover them." With respect to the first *Beattie* factor, AT&T alleged in its motion for fees that MRO's claims were without merit and that MRO therefore did not bring its claims in good faith. With respect to the second *Beattie* factor, AT&T alleged in its motion for fees that MRO's claims were without merit and that MRO therefore did not bring its claims in good faith. With respect to the second *Beattie* factor, AT&T alleged that its offer of judgment of $100,000 was reasonable in its timing because it made the offer of judgment more than two years before trial and after several of MRO's claims had already

been dismissed. In support of the reasonableness of the amount, AT&T alleged that "[t]he amount of the offer was more than reasonable, particularly given MRO's failure to reach the jury on any of its claims against AT&T." With respect to the third factor, AT&T alleged that "MRO's decision to reject AT&T's offer of judgment, under circumstances establishing that MRO's claims were groundless, was unreasonable and in bad faith.": With respect to the fourth factor, AT&T submitted extensive and highly detailed affidavits to show the amount of fees AT&T incurred and alleged that such a large award of fees was reasonable due to the complex and labor intensive nature of the case.

Under *Beattie*, the district court need only "consider" the four relevant factors. *Id.* The affidavits and exhibits submitted in support of and opposition to AT&T's motion for attorneys' fees were sufficient for the district court to consider each of the four factors and conclude that the amount of fees sought was "reasonable and justified." *Id.*

The district court did not abuse its discretion in awarding attorney's fees to AT&T.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed August 3, 1998]

No. CV-S-95-503-PMP (RLH)

MRO COMMUNICATIONS, INC.,
Plaintiff,

v.

AMERICAN TELEPHONE & TELEGRAPH,
Defendant.

ORDER

Before the Court for consideration is Defendant AT&T's Motion for Attorney's Fees (#384-#386), filed June 1, 1998. On June 30, 1998, Plaintiff MRO filed a Response in opposition to Defendant AT&T's Motion for Attorney's Fees (#395) to which Defendant AT&T Replied (#397 and #400) on July 21, 1998.

By its Motion, AT&T seeks recovery of $2,009,844.89 it incurred as legal fees and costs in defense of

MRO's state law claims on which AT&T prevailed in full between the date its offer of Judgment to MRO was rejected in July 1996, to and including May 18, 1998, when Judgment was entered in favor of AT&T and against MRO.

The attorney's fees sought by Defendant AT&T do not include work relating to MRO's federal statutory claims on which AT&T also prevailed. Although the fees requested are substantial, so was the litigation which spawned them. Having considered the Affidavits and Exhibits submitted in support of an in opposition of AT&T's Motion, the Court finds the attorney's fees are reasonable, and that under the applicable law, Defendant AT&T is entitled to recover them.

IT IS THEREFORE ORDERED that Defendant AT&T's Motion for Attorney's Fees (#384) is granted, and that Defendant AT&T is hereby awarded the sum of $2,009,844.89 in attorney's fees from Plaintiff MRO, which sum shall be paid within ninety (90) days of the date of entry of this Order.

DATED: August 3, 1998

/s/_____
PHILIP M. PRO
United States District Judge

APPENDIX C

[Filed January 27, 2000]

No. 98-16715
D.C. No. CV-95-00503-PMP

MRO COMMUNICATIONS, INC., *Plaintiff-Appellant,*	)
v.	)
AMERICAN TELEPHONE & TELEGRAPH COMPANY, now AT&T Corp., *Defendant-Appellee.*	)

ORDER

Before: CHOY, SCHROEDER, and ALARCÓN, Circuit Judges.

The panel has voted to deny plaintiff-appellant's petition for rehearing. Judge Schroeder has voted to deny the petition for rehearing en banc. Judge Choy and Judge Alarcón recommend that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Dated June 1, 1998]

No. CV-S-95-503-PMP (RLH)

MRO COMMUNICATIONS, INC. a Nevada Corporation, *Plaintiff,*	
v.	
AMERICAN TELEPHONE & TELEGRAPH COMPANY, now *Defendant.*	[EXCEPTS FROM AT&T'S MOTION FOR ATTORNEY'S FEES]
AT&T CORP., *Counterclaim-Plaintiff,*	
v.	
MRO COMMUNICATIONS, INC. *Counterclaim- Defendant.*	

AFFIDAVIT OF STEVEN M. BIERMAN
IN SUPPORT OF AT&T'S MOTION
FOR ATTORNEY'S FEES

Excerpts from AT&T's Motion for Attorney's Fees

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

STEVEN M. BIERMAN, being duly sworn, hereby deposes and says:

1. I am a member of the law firm of Sidley & Austin, attorneys for Defendant and Counterclaim-Plaintiff AT&T Corp. ("AT&T") in this action. I was lead trial counsel in the recent trial in this action. I make this declaration in support of AT&T's motion for attorneys' fees, based upon my personal knowledge and upon my review of the books and records of Sidley & Austin.

2. Attached hereto as Exhibit A is a true and correct copy of the Offer of Judgement AT&T served on Plaintiff and Counterclaim-Defendant MRO Communications, Inc. ("MRO") on June 3, 1996, in which AT&T offered to have judgment entered against it on all claims in the amount of $100,000.

3. MRO failed to accept AT&T's Offer of Judgment.

4. Attached hereto as Exhibit B are true and correct copies of relevant excerpts from the transcripts of the trial conducted in this matter between May 4, 1998 and May 14, 1998, to which AT&T's accompanying motion for an award of attorneys' fees refers.

5. Since AT&T retained Sidley & Austin for this matter, I have been the attorney at the firm responsible for

managing the matter, including responsibility for reviewing and preparing the legal bills that Sidley & Austin has presented to AT&T on a monthly basis. I also have been responsible for ensuring that the fees and expenses set forth in the bills are reasonable and reflect accurately the work

* * *

Excerpts from AT&T's Motion for Attorney's Fees

Exhibit A

SIDLEY & AUSTIN
A Partnership Including Professional Corporation

875 THIRD AVENUE
NEW YORK, NEW YORK 10022
TELEPHONE 212: 906-2000
TELEX 97-1696
FACSIMILE 212: 906-2021

June 3, 1996

BY TELECOPIER & FEDERAL EXPRESS

Richard J. Archer, Esq.
Archer & Hanson
1426 Fillmore Street, Suite 213
San Francisco, CA 94115

Re: MRO Communications, Inv. v. AT&T Corp.
Case No. CV-S 95-503 (D. Nev.) (PMP) (RLH)

Dear Mr. Archer:

Enclosed on behalf of defendant AT&T Corp. is an offer of judgment pursuant to Fed. R. Civ. P. 68. This seems an opportune juncture for such an offer of judgment, and we are available to discuss it during the time period permitted by Rule 68 in which plaintiff may accept the offer.

Very truly yours,

/s/_____
Steven M. Bierman

SMB/efr

cc: Andrew Goodman, Esq. (by telecopier)
Leonard F. Schwartzer, Esq. (by telecopier)
LeRoy Anderson, Esq. (by telecopier)
Todd M. Touton, Esq. (by telecopier)

Excerpts from AT&T's Motion for Attorney's Fees

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MRO COMMUNICATIONS, INC., a Nevada Corporation, *Plaintiff*,	)	
- against -	)	CV-S-95-503-PMP-(RLH)
AMERICAN TELEPHONE AND TELEGRAPH COMPANY, now AT&T CORP., *Defendant*.	)	

OFFER OF JUDGMENT OF
DEFENDANT AT&T CORP.

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant AT&T Corp. ("AT&T") hereby offers to allow judgment to be taken against it in this action, in the amount of one hundred thousand dollars ($100,000.00), together with costs accrued to date in accordance with Fed. R. Civ. P. 68. This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that the defendant is liable in this action or that the plaintiff has suffered any damage.

Dated: June 3, 1996

SIDLEY & AUSTIN

By: /s/_____
Steven M. Bierman
Alan M. Ungar
Lori Huff Dillman
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Attorneys for Defendant
AT&T Corp.

Supreme Court, U.S.
FILED
APR 12 2000
CLERK

(2)

No. 99-1515

IN THE

Supreme Court of the United States

MRO COMMUNICATIONS, INC.,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
NOW AT&T CORP.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AT&T CORP. IN OPPOSITION

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Counsel for Respondent

April 12, 2000

*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

15pp

QUESTION PRESENTED

Whether the award of attorneys' fees to AT&T Corp. ("AT&T") pursuant to Fed. R. Civ. P. 54(d) in accordance with Nevada state law was proper, after MRO Communications, Inc. ("MRO") rejected AT&T's offer for judgment and judgment was entered in AT&T's favor on all claims?

STATEMENT REQUIRED BY RULE 29.6

AT&T has no parent company. No publicly held company owns 10 percent or more of AT&T's stock.

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IN THE

Supreme Court of the United States

No. 99-1515

MRO COMMUNICATIONS, INC.,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
NOW AT&T CORP.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AT&T CORP. IN OPPOSITION

STATEMENT OF THE CASE

On August 3, 1998, following the conclusion of lengthy proceedings in this action that resulted in judgment for AT&T on all 28 claims asserted by MRO, the district court granted AT&T's motion for attorneys' fees pursuant to Fed. R. Civ. P. 54(d), in the amount of $2,009,844.89. The fees AT&T sought were exclusively those incurred in defending itself against MRO's state law claims, and only for the time period that followed MRO's rejection of AT&T's offer of judgment for $100,000. (Pet. App. at 2a-3a.)

In May 1989, MRO entered into a Billing Services Agreement ("BSA") with AT&T, pursuant to which AT&T agreed to provide MRO with billing and collection services for calls made to MRO's 900 number programs over AT&T's network. On July 23, 1993, MRO commenced this action with an eight-count complaint. On February 8, 1995, MRO filed a First Amended and Supplemental Complaint, asserting 28 claims, including state law claims for breach of contract and various tort claims, as well as several claims under federal law. (*See* Pet. App. at 2a-4a.)

On June 3, 1996, AT&T made a $100,000 offer of judgment. (Pet. App. at 24a-27a.) MRO did not accept AT&T's offer. Instead, MRO pursued the case to trial nearly two years later, which resulted in the district court ultimately granting AT&T's motion for judgment as a matter of law. (*See id.* at 4a.)

On May 31, 1998, AT&T filed a motion for attorneys' fees pursuant to Fed. R. Civ. P. 54(d)(2) and Local Rule 54-16 of the United States District Court for the District of Nevada. AT&T's motion sought fees only for the work directly related to AT&T's defense of MRO's state law claims, rested exclusively upon applicable state law, and sought only those fees incurred after MRO rejected AT&T's offer of judgment. In the period following the offer of judgment, AT&T had incurred more than $3 million in legal fees and expenses. However, AT&T deducted all fees arguably related to the defense of MRO's federal statutory claims. (*See* Pet. App. at 4a-5a.) Numerous state law claims were pending at the time of trial. MRO did not challenge the reasonableness or the amount of the fees.

THE DECISIONS BELOW

On August 3, 1998, the district court granted AT&T's motion for attorneys' fees. Although AT&T's motion was filed

pursuant to Fed. R. Civ. P. 54(d)(2), the district court properly relied upon the substantive law of Nevada in ruling that AT&T's fees were authorized and were reasonable, noting that "[a]lthough the fees requested are substantial, so was the litigation which spawned them." (Pet. App. at 18a.) The Ninth Circuit affirmed the award, properly concluding that the district court did not abuse its discretion in awarding attorneys' fees to AT&T. (*Id.* at 1a-16a.)

Petitioner's entire argument in the Ninth Circuit, as well as in its petition here, is that Fed. R. Civ. P. 68, rather than state law, governs the propriety of an award of attorneys' fees in this case. The Ninth Circuit properly rejected that analysis. Where there is no conflicting federal rule, and the claims in federal court are state law claims, state law will govern those state law claims. Because AT&T was in federal court, however, it did have to comply with federal procedural law that governs how offers of judgment are to be made, and under what circumstances attorneys' fees may be awarded.

As the Ninth Circuit explained, "Federal Rule 68 sets forth the *procedure* that must be followed in a federal district court to make an offer of judgment," and thus AT&T had to follow that procedure in federal court. (Pet. App. at 5a (emphasis added).) As that court correctly noted, AT&T's Rule 68 offer of judgment by its terms meant that if MRO did not accept the offer of judgment, and did not recover more than that amount, then MRO "must pay the costs incurred after the making of the offer." (Pet. App. at 6a.)

The Ninth Circuit then determined the substantive law – what constituted "costs" under AT&T's offer of judgment. Finding that attorneys' fees may be included as costs where authorized by a "relevant substantive statute or other authority," the Ninth Circuit noted that no federal authority provided for the recovery of attorneys' fees. The Court properly followed this Court's ruling in *Delta Airlines, Inc. v. August*,

450 U.S. 346, 352-54, 101 S.Ct. 1146, 1150-51 (1981), which held that when the defendant prevails in a federal case and the plaintiff recovers nothing – as happened here – Rule 68 is inapplicable. (*See* Pet. App. at 7a.)

The Ninth Circuit turned to the applicable Rule under which AT&T moved, Fed. R. Civ. P. 54(d)(2), to analyze whether AT&T was entitled to recover its attorneys' fees. (Pet. App. at 7a.) The Ninth Circuit correctly observed that Rule 54(d)(2) expressly authorizes a district court to award attorneys' fees where, as is the case, there is an "independent source of authority" to make such an award. (Pet. App. at 8a.)

The Ninth Circuit observed that "where a district court is exercising its subject matter jurisdiction over a state law claim, so long as 'state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorneys' fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." (*Id.* (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 260-61, 95 S.Ct. 1612, 1623 (1975)).) Given that there was no controlling or conflicting federal rule, and because this action was brought in federal court in Nevada, reference to Nevada state law was required. The Ninth Circuit held that under the applicable Nevada state offer of judgment rule, "a defendant shall be awarded reasonable attorneys' fees incurred from the time of an offer of judgment if the plaintiff rejects it and fails to receive a more favorable result." (Pet. App. at 9a.)[1]

The Ninth Circuit carefully reviewed Nevada state law governing offers of judgment and properly held that nothing

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[1] The Nevada Supreme Court has held that Nevada's offer of judgment rule applies to judgments entered against the offeree. (*Id.* at 10a (citing *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983)).)

under Nevada law "prescribe[d] the procedure that should be followed in a *federal* court in making an offer of judgment. The only procedure for notifying a plaintiff of an offer of judgment in federal court is set forth in Federal Rule 68. AT&T followed that procedure." (Pet. App. at 12a (emphasis in original).) The Ninth Circuit aptly observed that MRO would have been liable for attorneys' fees had it brought its case in Nevada state court, and therefore, it "would be unjust and a violation of national policy described in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), to reach a different result here simply because the forum is federal." (Pet. App. at 13a.)

REASONS FOR DENYING THE PETITION

MRO asserts that this Court should grant its petition to establish that the holding in *Delta Airlines* applies equally to federal and state claims brought in federal court. According to MRO, because many cases in federal court may involve state law claims based on a district court's supplemental jurisdiction, there will be "confusion" if rules differ depending on whether offers of judgment apply to federal claims or to state claims. (Pet. at 8.) MRO asserts that this Court must reverse the Ninth Circuit's award of attorneys' fees under Nevada state law in order to ensure "uniformity" under Federal Rule 68. (*Id.*)

In essence, MRO asks this Court to reverse *Erie* because the Ninth Circuit's ruling is simply a straightforward application of *Erie*. It is axiomatic that the federal rules are procedural, and are not meant to trump important state interests where state law claims are brought in federal courts under either diversity or supplemental jurisdiction. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 n.7, 116 S.Ct. 2211, 2220 n.7 (1996) (noting that "[f]ederal courts have interpreted the Federal Rules, however, with sensitivity

to important state interests and regulatory policies," such as to situations where state offer of judgment rules may apply when not in conflict with the Federal Rules). AT&T originally made its offer of judgment under Federal Rule 68, because, as the Ninth Circuit aptly observed, it was the only procedural mechanism for making an offer of judgment in federal court. (Pet. App. at 5a.)

Once judgment was granted to AT&T, under *Delta Airlines*, Rule 68 became inapplicable because the defendant was granted judgment. However, a prevailing defendant may nevertheless move to recover its costs as a prevailing party under Fed. R. Civ. P. 54(d). *See Delta Airlines*, 450 U.S. at 354, 101 S.Ct. at 1151 (Rule 68 "does not apply to judgments in favor of the defendant or to judgments in favor of a plaintiff for an amount greater than the settlement offer. In both of those extreme situations, the trial judge retains his Rule 54(d) discretion."). Under Rule 54(d)(2), a prevailing defendant may seek to recover attorneys' fees incurred in defending itself against state law claims where the substantive state law specifically authorizes such a recovery. That result is required both under *Erie* and the Rules of Decision Act, 28 U.S.C. § 1652.[2] That is precisely what AT&T did below, and its motion sought only the attorneys' fees that AT&T incurred in defending itself against MRO's state law claims.

As is mandated by Rule 54(d)(2), the Ninth Circuit properly looked to the substantive law authorizing the award of attorneys' fees with respect to the state law claims: the law of the forum state, here Nevada. The Ninth Circuit properly determined that Nevada's offer of judgment rule provided for

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[2] Section 1652 provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

the recovery of attorneys' fees where, like AT&T in this case, a defendant prevailed *in toto* at trial and the plaintiff had unreasonably rejected defendant's offer of judgment.

The Ninth Circuit correctly followed *Delta Airlines* in holding that Federal Rule 68 does not "encompass a judgment against the offeree" (Pet. App. at 10a) and thus its mandate (to impose costs on a plaintiff) has no application because judgment was entered against the offeree, MRO. Because there was no applicable countervailing federal rule, Rule 54 as well as *Erie* pointed the trial court to state law. *See, e.g., Gasperini*, 518 U.S. at 428 n.7, 116 S.Ct. at 2220 n.7 (citing with approval the Seventh Circuit's holding in *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist.*, 60 F.3d 305 (7th Cir.), *cert. denied*, 516 U.S. 1010 (1995), that a "state provision for offers of settlement by plaintiffs is compatible with Federal Rule 68, which is limited to offers by defendants"); *Tanker Management, Inc. v. Brunson, M.D.*, 918 F.2d 1524, 1529-30 (11th Cir. 1990) (holding that because Rule 68 does not apply where defendant prevails, in diversity action under *Erie* it is proper to consider state offer of judgment rule that awarded attorneys' fees to prevailing defendant); *Ganapolsky v. Keltron Corp.*, 823 F.2d 700, 701-02 (1st Cir. 1987) (upholding award of attorneys' fees under state offer of judgment rule after suit had been dismissed and judgment rendered in defendants' favor, noting *Delta Airlines* did not apply).[3] The

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[3] MRO erroneously contends that the Ninth Circuit's opinion "reject[ed]" the holding of *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136 (1965), wherein this Court held that Fed. R. Civ. P. 4(d)(1) is a procedural rule that applies in diversity actions over state law under the Rules Enabling Act. (Pet. at 7-8.) *Hanna* is inapposite for the simple reason that this Court held in *Delta Airlines* that Rule 68 does *not* apply to any cases in which judgment is rendered against the offeree, whereas in *Hanna* the Court held that Rule 4 applies in all diversity cases filed in federal courts. Only if this Court had ruled differently in *Delta Airlines* and held that Rule 68 applied to prevailing defendants would *Hanna* control.

kind of uniformity sought by MRO is necessarily frustrated by the *Erie* doctrine, which requires that federal courts turn to the laws of the states. In this case, the Ninth Circuit employed the well-established law set forth by this Court in *Delta Airlines* and *Erie* in applying state offer of judgment rules to state law claims where Rule 68 is inapplicable – which itself sets forth a uniform approach.[4]

Moreover, the rule properly applied by all of the circuit courts that have considered this issue is aimed at avoiding forum-shopping, one of the ills recognized by this Court in *Erie*. *See* Pet. App. at 13a; *S.A. Healy Co.*, 60 F.3d at 311 (state offer of judgment statute should apply in federal court where Rule 68 was inapplicable because *Erie* goal of deterring forum-shopping would be served by applying state law). The Ninth Circuit's application of settled law in this case does not merit this Court's review.

Finally, MRO asks this Court to engage in mere error correction as to whether the Ninth Circuit properly construed Nevada's law concerning offers of judgment. (Pet. at 6, 9.) No correction is needed, however, because the Ninth Circuit's result was proper under applicable Nevada law. In the two Nevada Supreme Court decisions cited by MRO for the proposition that AT&T's offer was invalid because it did not specify any Nevada statute or rule (Pet. at 6-7 n.4 & 9), the Nevada Supreme Court was concerned with a wholly unrelated matter – the different result with respect to costs avail-

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[4] Obviously, because some states like Nevada authorize recovery of attorneys' fees when an offer of judgment has been unreasonably refused by plaintiff and judgment is entered in favor of the defendant (a situation where Rule 68 is inapplicable), and other states do not, there will not be uniformity in the result. Differing results do not mean that there is no "uniformity" in the federal courts. The material uniformity is that required by *Erie* – a uniform application of state substantive rules when there is no conflicting or controlling Federal Rule of Civil Procedure.

able under one statute but not the other. *See Ramadanis v. Stupak*, 104 Nev. 57, 59-60, 752 P.2d 767, 768 (Nev. 1988) (prejudgment interest could not be recovered where Nev. R. Civ. P. 68 did not provide for the denial of prejudgment interest when the final judgment is less favorable than the offer of judgment while Nev. Rev. Stat. § 17.115 did, and offer of judgment made under Nev. Rule 68 only); *Trustees of Carpenters For Southern Nevada Health and Welfare Trust v. Better Building Co.*, 101 Nev. 742, 710 P.2d 1379 (Nev. 1985) (because offer of judgment made only under Nev. R. Civ. P. 68, which did not provide for expert fees, and not Nev. Rev. Stat. § 17.115, which did, expert fees not available where offeree refused offer of judgment and lost). By contrast, the costs at issue here – attorneys' fees – are available under either Nevada state provision. *See Pombo v. Nevada Apartment Ass'n*, 113 Nev. 559, 562, 938 P.2d 725, 727 (Nev. 1997) (attorneys' fees available under both Nev. R. Civ. P. 68 and Nev. Rev. Stat. § 17.115).

Moreover, in neither Nevada decision did the Nevada Supreme Court suggest that an offer of judgment seeking attorneys' fees must reference the specific state statute or rule under which it was made, particularly where, as the Ninth Circuit aptly noted, MRO elected to pursue its state law claims in *federal* court. (*See* Pet. App. at 12a.) Rather, the procedure for making an offer of judgment in federal court is set forth in Rule 68, not the Nevada statutes. AT&T followed that procedure (*id.*), and MRO does not contend otherwise.

At bottom, MRO's uncertworthy petition merely asks this Court to revisit the Ninth Circuit's application of settled law to the specific facts of this case. MRO points to no split in the circuit courts below, or any other purported lack of uniformity with respect to this Court's well-established jurisprudence regarding Rule 68 and the *Erie* doctrine. There simply

is nothing set forth in MRO's petition deserving of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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(3)

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No. 99-1515

IN THE
SUPREME COURT OF THE UNITED STATES

MRO COMMUNICATIONS, INC.,
a Nevada Corporation,
Petitioner,

v.

AMERICAN TELEPHONE &
TELEGRAPH COMPANY, now AT&T Corp.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED FOR REVIEW

Whether under Fed.R.Civ.P. Rule 68 and *Delta Air Lines v. August*, 450 U.S. 346 (1981), a defendant who makes a formal settlement offer only under Rule 68, which is rejected, and then obtains judgment against the plaintiff offeree on state law claims, may recover attorney's fees against the plaintiff; in a case where state law would prohibit such recovery?

PARTIES TO THE PROCEEDING

Petitioner

The parent company of Petitioner MRO Communications, Inc. ("MRO") is Bellatrix International, Inc. a corporation which has shares issued to the public.

Respondent

The Respondent is AT&T Corporation.

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THE WRIT SHOULD BE GRANTED BECAUSE THE PETITION ON THE MERITS SHOULD BE GRANTED.

As pointed out in MRO's Petition, MRO has also petitioned this Court, Petition No. 99-1480, to reverse the judgment dismissing its antitrust claim in this same action. If that occurs, this attorney's fee judgment must also be reversed. This situation demonstrates why the judgment of the lower court is wrong; the lower court treated state claims differently although Rule 68 makes no distinction. Attorney's fees have been granted AT&T for the judgment in its favor dismissing only MRO's state claims; that judgment has not been appealed. There is no dispute, however, that if the judgment on the antitrust claims is reversed, the fees judgment should be reversed. This is because AT&T's offer of judgment was for the entire action (Petition, App. D).

NEITHER NEVADA STATE LAW NOR *ERIE R. CO. V. TOMPKINS*, 304 U.S. 64, 58 S.CT. 817 (1938) SUPPORTS THE JUDGMENT FOR FEES.

The judgment for fees in this action was rendered because MRO Communications, Inc. ("MRO") rejected an offer of judgment from AT&T (App. A at 3a; AT&T Br. i). That offer of judgment was made only "Pursuant to Rule 68 of the Federal Rules of Civil Procedure," only "in accordance with Fed.R.Civ.P.68", and only "for the purposes specified in Rule 68." No Nevada statute or rule mentions Federal Rule of Civil Procedure 68. Federal Rule 68 does not differentiate between state and federal causes of action. Because no state offer of judgment was made by AT&T, attorney's fees could not be awarded to AT&T even in a

Nevada state court; therefore, there is no state law upon which *Erie* can operate.

AT&T's cases applying state law on offers of judgment made "pursuant to" state law, "in accordance with" state law, or "for the purposes specified" in state law are therefore irrelevant.

AT&T's citation to cases (Br. 7-8) in which offers of judgment were expressly made under state statutes or rules have no application here; those offers didn't mention Federal Rule of Civil Procedure 68. Only in this case has a federal court held that Federal Rule of Civil Procedure applies differently to federal claims and state claims. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 101 S.Ct. 1146 (1981) should be applied uniformly in federal courts; it is a rule of procedure; *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136 (1965).

CONCLUSION.

For the foregoing reasons MRO's Petition should be granted.

Dated: March ____, 2000.

Respectfully submitted,

/s/_____

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